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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VIJAY PAL, Plaintiff and Appellant, v. NORDSTROM, INC., Defendant and Respondent.	B203004 (Los Angeles County Super. Ct. No. LC077592)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stanley Weisberg, Judge. Affirmed.

Law Offices of Robert M. Baskin and Christopher A. Fortunati for Plaintiff and Appellant.

Manning & Marder, Kass, Ellrod, Ramirez and Scott Wm. Davenport for Defendant and Respondent.

Appellant Vijay Pal ("Pal") brought an action in negligence against Respondent Nordstrom, Inc. ("Nordstrom"). In her operative complaint, Pal alleged that Nordstrom failed to exercise reasonable care to protect certain jewelry owned by Pal which she inadvertently left in a dressing room. On appeal, Pal argues that the trial court erred in sustaining Nordstrom's demurrer to the complaint without leave to amend. We conclude that Pal has failed to state a cause of action for negligence or premises liability against Nordstrom because Nordstrom did not owe Pal a legal duty of care. We also conclude that there is no reasonable possibility that Pal can cure the defects in her complaint against Nordstrom by further amendment. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 9, 2007, Pal filed a First Amended Complaint against Nordstrom and fictitiously named "Doe" defendants 1 through 100. She asserted two causes of action against Nordstrom for general negligence and premises liability, and one cause of action against the "Doe" defendants for conversion. The First Amended Complaint set forth the following factual allegations:

Pal was a frequent patron of a retail store owned and operated by Nordstrom. On or about January 9, 2007, Pal entered a dressing room of Nordstrom wearing six platinum and diamond bracelets. An employee of Nordstrom was present in the dressing room and knew that Pal was wearing the bracelets when she entered the room. Pal had worn those same bracelets at Nordstrom on numerous prior occasions. Once in the dressing room, Pal tried on several articles of clothing that were for sale, and in so doing, she removed her six bracelets. The bracelets were left in plain view to anyone, including Nordstrom's employees.

No one other than Pal and the Nordstrom's employee was present in the dressing room during the time that Pal was there. Pal later left the dressing room while the employee was still present, and mistakenly left her bracelets in the dressing room in plain view. A few minutes after departing, Pal realized that she did not have her bracelets with

her and returned to the dressing room. Employees of Nordstrom then looked for the bracelets in the dressing room, but were unable to locate them.

Upon determining that the six bracelets were missing, Pal requested that Nordstrom take immediate action to recover her property, including contacting the police department, announcing the loss over the public address system, and making a videotape of the dressing room immediately available to her. Nordstrom refused to take any of the actions requested by Pal. In addition to these allegations, Pal asserted that because the only persons present with her in the dressing room were Nordstrom's employees, Nordstrom had possession and custody of Pal's bracelets and failed to take reasonable steps to secure the protection of her property.

In response to the First Amended Complaint, Nordstrom filed a demurrer to each of the three causes of action alleged by Pal. On August 16, 2007, the trial court sustained the demurrer without leave to amend as to the first cause of action for premises liability and as to the second cause of action for general negligence, finding that Pal had failed to allege any legal duty owed by Nordstrom. The court also ruled that the demurrer to the third cause of action for conversion was moot because Nordstrom was not a named defendant with respect to that cause of action.[1] On August 20, 2007, the trial court entered a Judgment of Dismissal in favor of Nordstrom whereby it ordered that Pal take nothing from her complaint against Nordstrom and that Nordstrom recover its costs of suit. Pal thereafter filed a timely notice of appeal.

DISCUSSION

I. Standard Of Review

In reviewing the sufficiency of a complaint against a demurrer, we "treat[] the demurrer as admitting all material facts properly pleaded," but we do not "assume the

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[1] Concurrently with its demurrer, Nordstrom filed a motion to strike the first cause of action for premises liability. In light of its ruling on the demurrer, the trial court concluded that the motion to strike was also moot and ordered it taken off calendar.

truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We liberally construe the pleading to achieve substantial justice between the parties, giving the complaint a reasonable interpretation and reading the allegations in context. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained, we must determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) Moreover, when a demurrer is sustained without leave to amend, we also must determine whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If it can be cured, the trial court has abused its discretion in sustaining the demurrer without leave to amend and we reverse. (*Ibid*.) If it cannot be cured, there has been no abuse of discretion and we affirm. (*Ibid*.) The burden of showing that a reasonable possibility exists that the complaint can be cured by amendment rests squarely with the plaintiff. (*Ibid*.)

II. Negligence And Premises Liability

To prevail on an action for general negligence or premises liability, the plaintiff must show that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of the injuries suffered by the plaintiff. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Duty is an essential element of a negligence claim. "If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another." (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 150.) The existence of a legal duty in the first instance is a question of law for the court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, superseded by statute on other grounds as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.)

As a general rule, one has "no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) Thus, where a complaint alleges injuries resulting from the wrongful acts of third persons, the common law ordinarily does not impose a duty upon a defendant to control the conduct

of another or to warn of such conduct. (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1079.) An affirmative duty to act may arise, however, where there is a special relationship between the parties. (*Delgado v. Trax Bar & Grill*, *supra*, at p. 235.) Among the commonly recognized special relationships that may give rise to a legal duty is that "between a possessor of land and members of the public who enter in response to the landowner's invitation." (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806.)

Under a premises liability theory, landowners have a general duty to their invitees of maintenance which requires them "to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 674.) This duty encompasses a responsibility "to take reasonable steps" to secure the premises against "foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ibid*.) However, a proprietor of land is not the insurer of the safety of persons on its premises and is not required to take precautions against acts of third parties that the proprietor has no reason to anticipate. Even where a special relationship exists, as in the case of a landowner and invitee, the "duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Id*. at p. 676.)

In the recent past, the California Supreme Court has had occasion to consider the scope of a proprietor's duty to protect persons against the criminal acts of third parties. (See, e.g., *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1210-1211; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264; *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 229; *Wiener v. Southcoast Childcare Centers, Inc.*, *supra*, 32 Cal.4th at pp. 1141-1142; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1185, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 670.) In deciding whether to impose a duty to protect against third party conduct, the Supreme Court has focused its analysis on balancing the foreseeability of the criminal act against the burden of the duty to be imposed. In cases where the burden of preventing future harm is great, a high degree of

foreseeability generally is required. (*Sharon P. v. Arman, Ltd.*, *supra*, at p. 1190-1191; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, at pp. 678-679.) On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may suffice. (*Ibid*.)

In this case, Pal contends that Nordstrom owed a duty of reasonable care to its business invitees to protect their personal property from harm caused by the wrongful conduct of third parties. Pal further claims that because no one other than Nordstrom's employees was present in the dressing room with her, Nordstrom took possession and custody of Pal's bracelets from the time she left the premises, but failed to exercise reasonable care to protect her property from theft. In support of her argument regarding Nordstrom's alleged duty, Pal relies principally on the 1951 decision in *Fuller v. I. Magnin & Co.* (1951) 104 Cal.App.2d 517 (*Fuller*).

In *Fulle*r, the plaintiff, identified only as Mrs. John Elstun, was a long-time customer of the defendant's high-end retail specialty store. (*Fuller*, *supra*, 104 Cal.App.2d at p. 519.) In April 1948, the plaintiff and her daughter visited the store to select some dresses. (*Ibid*.) They were escorted to a large, private fitting room where they remained for the duration of their two-hour visit and were assisted by a saleswoman who brought sample dresses directly to them. (*Id*. at pp. 519-520.) Once in the fitting room, the plaintiff removed her own dress, which had a valuable brooch attached to it, and placed it on a nearby chair. (*Id*. at p. 520.) The saleswoman was aware that the plaintiff was accustomed to wearing the brooch and observed that the plaintiff had removed her dress to try on the clothing. (*Ibid*.) As the fitting session was concluding, the saleswoman collected the dresses that the plaintiff had declined to purchase, including some items that had been placed on the chair along with the plaintiff's dress. (*Ibid*.) In so doing, the saleswoman inadvertently picked up the plaintiff's dress and took it with the others to the stock room. (*Ibid*.) When it was discovered that the plaintiff's dress had been returned with the rest of the items, the saleswoman immediately searched the stock room and recovered the plaintiff's dress, but the brooch was missing. (*Ibid*.)

The plaintiff in *Fuller* obtained a judgment against the store for negligence. On appeal, the First District affirmed the judgment on the grounds that the store negligently took possession and custody of the plaintiff's dress and brooch and directly caused her loss. (*Fuller, supra,* 104 Cal.App.2d at p. 521.) In reaching its holding, the court first recognized that a business proprietor generally has a duty to use reasonable care to keep its premises safe for invitees. (*Id*. at pp. 522-523.) It then reasoned that, under certain circumstances, that duty could extend to the protection of personal property that a customer brings to the premises and necessarily lays aside while conducting business, provided that the storekeeper has adequate notice of the removal of such property. (*Id*. at p. 525.) In the case of the plaintiff's dress, the court noted that saleswoman had actual notice of the dress and brooch because she observed that the plaintiff had removed her dress to try on clothing. (*Id*. at p. 522.) The court also noted that the saleswoman took actual possession of the plaintiff's dress and brooch when she moved them from the fitting room to the stock room, thereby taking them "from a place of safety to a place of hazard" where their loss was foreseeable. (*Id*. at p. 525.) Under such circumstances, the court concluded that the store breached a duty of reasonable care owed to the plaintiff and was liable for her lost property. (*Ibid*.)

Notably, the decision in *Fuller* predates modern jurisprudence on premises liability which balances the foreseeability of the third party conduct against the burden of the duty to be imposed. (*Sharon P. v. Arman, Ltd., supra,* 21 Cal.4th at pp. 1190-1191; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at pp. 678-679.) Even if *Fuller* still applies, however, it fails to support Pal's argument that Nordstrom owed her a legal duty of care. Clearly, the most critical factor in *Fuller* was the defendant's actual possession and removal of the plaintiff's property which occurred when its salesperson physically took the plaintiff's dress and brooch from a private, secure fitting room to an unguarded stock room. (*Fuller*, *supra,* 104 Cal.App.2d at p. 521.) Here, on the other hand, Pal does not allege in her complaint that any employee of Nordstrom took actual physical custody of her bracelets. Rather, she asserts that Nordstrom had custody because its employee was the only other person present in the dressing room while Pal

was there. But that allegation alone does not support that there was actual physical custody of Pal's bracelets on the part of Nordstrom because it does not preclude the possibility that a non-employee may have entered the dressing room once Pal left. Additionally, Pal does not allege that any employee of Nordstrom had actual knowledge that Pal left her bracelets in the dressing room. All that Pal alleges in her complaint about Nordstrom's knowledge is that an employee knew Pal was wearing the bracelets when she entered the room and that the bracelets were left in plain view. In contrast, the salesperson in *Fuller* directly observed that the plaintiff had taken off her dress to try on clothing, and then removed the dress from the room. (*Fuller*, *supra*, at pp. 520, 522.)

Therefore, contrary to Pal's contention, *Fuller* does not stand for the proposition that a business proprietor has a duty to safeguard any personal property that is inadvertently left by a patron in the course of conducting business. Rather, *Fuller* holds that the imposition of a legal duty will depend largely on whether the proprietor has adequate notice of the mislaid property and assumes physical custody of it. (*Fuller*, *supra*, 104 Cal.App.2d at p. 525.) Because Pal does not allege sufficient facts to show that Nordstrom had both actual physical custody of her bracelets and actual knowledge that she left her bracelets in the dressing room, Pal cannot state a cause of action for negligence or premises liability under the reasoning of *Fuller*.

As discussed above, recent case law on premises liability diverges from *Fuller* in that it focuses on balancing the foreseeability of the harm posed by the third party conduct against the burden of the duty to be imposed on the proprietor. For instance, heightened foreseeability is required to find that the scope of a business proprietor's duty of care includes the hiring of security guards. (*Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at pp. 1190-1191; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at pp. 678-679.) Such a high degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the proprietor's premises or at substantially similar businesses in the immediate proximity. (*Ibid*.) On the other hand, in cases where the harm can be prevented by simple means, a proprietor may owe a duty of care to invitees to take minimally burdensome steps to protect against third party crime

that is reasonably, rather than highly, foreseeable. (*Morris v. De La Torre, supra*, 36 Cal.4th at pp. 270-271; *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at pp. 242-243.). Yet regardless of whether a heightened or lesser degree of foreseeability is required, "'[t]he dispositive issue remains the foreseeability of the criminal act. Absent foreseeability of the particular criminal conduct, there is no duty to protect the plaintiff from that particular type of harm.' [Citation.]" (*Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 431.)

Pal's First Amended Complaint is devoid of any facts that would support a showing of foreseeability. Pal does not allege that there were prior incidents of theft in Nordstrom's dressing rooms or that Nordstrom had prior knowledge of any purported theft. Nor does Pal allege that Nordstrom should have known that she would leave her bracelets behind when she departed the premises. Indeed, as set forth in the complaint, Pal's failure to take her bracelets with her was the result of Pal's own mistake rather than any action, or inaction, by Nordstrom. Given the absence of allegations that Nordstrom had actual custody of her bracelets or actual knowledge that she left them in the dressing room, Pal cannot show that the subsequent theft of her bracelets was at all foreseeable. As for the remaining allegations in the complaint that Nordstrom failed to take immediate action to recover Pal's bracelets once she reported the loss, Pal does not cite to any legal authority or provide any argument to establish the existence of such a duty, nor does she explain how any post-theft investigation by Nordstrom could have prevented her loss. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court "'is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record'"]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [even where appellate review is de novo, "it is limited to issues which have been adequately raised and supported in [appellant's] brief"].) We likewise are unaware of any authority to support a claim that a business proprietor has a legal duty to produce video surveillance, broadcast incidents of lost property, or otherwise conduct an immediate investigation into a customer's report of theft. Pal accordingly has failed to plead sufficient facts to demonstrate that Nordstrom owed her a legal duty of care.

Alternatively, Pal argues that she should be allowed to further amend her complaint to cure any defects. She proposes three specific amendments to address the deficiencies in her allegations against Nordstrom. First, Pal contends that she would allege that Nordstrom assumed physical custody of her bracelets because its employees were the only other persons present in the dressing room with Pal. But the First Amended Complaint already alleges that Nordstrom had possession and custody of the bracelets because "[d]uring the time frame that [Pal] was changing in the dressing room, the only persons in the dressing room were [Nordstrom's] employees." That allegation is not sufficient to show actual physical custody because Pal does not suggest she can allege that no one other than Nordstrom's employees entered the dressing room after she left. Second, Pal claims that she would allege that the removal of her bracelets was necessary to try on clothing, as was the case in *Fuller*. Yet even in *Fuller*, the court recognized that the necessary removal of jewelry could not support the existence of a legal duty unless the storekeeper had adequate notice that the jewelry had been removed. (*Fuller*, *supra*, 104 Cal.App.2d at p. 525.) Other than alleging that her bracelets were in plain view, Pal does not offer any facts to demonstrate that Nordstrom had actual knowledge that she removed her bracelets or left them in the dressing room. Finally, Pal asserts that she would allege that Nordstrom caused the loss of her bracelets because its employees either misplaced or converted them. That allegation, however, only addresses the issue of causation which is insufficient to sustain a claim for negligence in the absence of a legal duty.

Because Pal has failed to plead sufficient facts to support that Nordstrom owed her a legal duty of care, and has failed to show how further amendment could cure the defects in her complaint, the trial court properly sustained Nordstrom's demurrer to the first and second causes of action without leave to amend. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading."]; *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685 ["[L]eave to amend should *not* be granted where . . . amendment would be futile."].)

III. Conversion

Nordstrom also demurred to Pal's third cause of action for conversion. However, as both parties concede, the First Amended Complaint demonstrates that such cause of action was alleged only against the fictitiously named "Doe" defendants, and not against Nordstrom. The trial court therefore concluded that Nordstrom's demurrer to the third cause of action was moot given that Nordstrom was not a named defendant with respect to that claim. On appeal, neither party challenges the trial court's finding of mootness as to Nordstrom, as it is clear that a party that demurs to a complaint may only do so on its own behalf and only as to the specific causes of action alleged against it. (Code Civ. Proc., §§ 430.10, 430.50.) Instead, Pal argues that when the trial court subsequently entered a final judgment in favor of Nordstrom, it improperly dismissed the entire complaint, including the cause of action against the "Doe" defendants. Based on our review of the record, we disagree.

First, while it is true that the trial court's ruling on Nordstrom's demurrer resulted in the dismissal of Nordstrom from the action, the ruling did not, on its face, function as a concurrent dismissal of all "Doe" defendants. Indeed, the trial court's August 16, 2007 Minute Order makes clear that the court was not sustaining Nordstrom's demurrer to the third cause of action because such claim was not alleged against Nordstrom. Pal's third cause of action against the "Doe" defendants thus survived the successful demurrer brought by Nordstrom, as it is legally permissible to assert a complaint or a cause of action against only fictitiously named defendants. (See, e.g., *Pearlson v. Does 1 To 646* (1999) 76 Cal.App.4th 1005, 1010 [complaint for trespass and invasion of privacy named only 646 "Doe" defendants]; *Wallis v. Southern Pac. Transportation Co.* (1976) 61 Cal.App.3d 782, 784-785 [complaint for negligence originally named only 20 "Doe" defendants].)[2]

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[2] We note that, while legally permissible, an action against only "Doe" defendants may ultimately be dismissed by a trial court as a sham where the plaintiff is unable to demonstrate that it has any significant potential to determine the identity of a viable defendant. (*Pearlson v. Does 1 To 646, supra,* 76 Cal.App.4th at pp. 1011-1012 [trial

Second, contrary to Pal's contention, we do not read the trial court's August 20, 2007 Judgment of Dismissal as a dismissal of the entire action, including the third cause of action for conversion. On its face, the Judgment of Dismissal reflects that the trial court simply was dismissing Nordstrom from the action by ordering that Pal take nothing from her complaint against Nordstrom and that Nordstrom recover its costs of suit. Notably, that was the only judgment that Nordstrom could have obtained through its demurrer given that it was not entitled to a dismissal of claims not alleged against it. However, to the extent that either party believes that the trial court's Judgment of Dismissal constituted a dismissal of the entire action rather than the action against Nordstrom, that party may request clarification from the trial court that Pal's action against the "Doe" defendants remains.

DISPOSITION

The judgment is affirmed. Nordstrom shall recover its costs on appeal.

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ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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court properly dismissed action against "Doe" defendants that had been pending for two years where plaintiff failed to identify any specific person that could be connected with the allegations in his complaint]; Code Civ. Proc., § 153.150 [trial court has the inherent authority to dismiss an action or impose other sanctions].) That issue, however, is not before us in this appeal.